



1993

Bonehead Non-Proliferation


David A. Koplow

Georgetown University Law Center, koplow@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1737>

17 Fletcher For. World Aff. 145

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [International Law Commons](#), and the [National Security Law Commons](#)

BONEHEAD NON-PROLIFERATION

DAVID A. KOPLOW

The Review and Extension Conference of the Non-Proliferation Treaty (NPT) will convene in 1995. The primary issue to be considered at the Extension Conference is whether the NPT, universally regarded as the most important bulwark against the spread of nuclear weaponry, should remain in force. In this article, David A. Koplow argues that the United States must negotiate a Comprehensive Test Ban Treaty (CTBT) in order to maintain the non-proliferation regime and promote its own long-run security interests.

Into the final week of the 1908 National League baseball pennant race, the New York Giants and the Chicago Cubs struggled to a dead heat in the standings. On September 23, when the two teams met in a decisive contest at the Polo Grounds in Manhattan, they were tied 1-1 into the bottom of the ninth inning. With Moose McCormick on first base and two out, the Giants' Fred Merkle drove a long single down the rightfield line, advancing McCormick to third. The next batter, Al Bridwell, lashed a solid single to center field, and McCormick crossed home plate scoring what should have been the winning run. But, in a play that has remained infamous in baseball lore, Merkle failed to run all the way to second base. Instead, when he saw McCormick score, Merkle simply turned in the basepath and jogged back to the Giants' celebrating dugout.

Cubs second baseman Johnny Evers recognized the gaffe, called for the baseball, shouted for the umpire's attention, and stepped on second base. This completed a force play, putting Merkle out, ending the inning, and negating McCormick's apparent score.

The capacity New York crowd had already overrun the field in delight, and it was impossible to restore order, so the game was suspended as a draw, despite vigorous protests from both teams. A week later, at the conclusion of the regular season, the Cubs and Giants were still tied for first place, and a one-game playoff, making up the September 23 misplay, was arranged. The Cubs, behind Mordecai "Three Finger" Brown, then edged the Giants and Christy Mathewson 4-2 to claim the pennant, and they went on to rout Ty Cobb's Detroit Tigers four games to one in the World Series.

Despite a long and productive major league career, Fred Merkle never quite lived down the nickname "Bonehead," and a new verb, "to merkle," meaning,

David A. Koplow is a Professor of Law at Georgetown University Law Center. The author would like to thank the Lawyers Alliance for World Security for its support in the preparation of this article. A version of this article will appear in an upcoming volume of the Wisconsin Law Review.

"to fail to arrive" entered the American colloquial vocabulary.

Today, with the end of the Cold War and the interment of the reflexive United States-Soviet Union hostility, many Americans believe that our traditional search for national security has finally been successfully concluded. As the federal government has produced a host of bilateral and multilateral arms control agreements embracing topics including strategic offenses, chemical weapons, and conventional forces in Europe, the prospects seem bright for further amelioration of some of the most intractable security dilemmas of the past half-century.

Yet just when the global security apparatus seems poised for a crowning success, a disastrous "bonehead" misstep in the area of nuclear non-proliferation threatens to undo much of the potential gain. In particular, the United States' continued refusal, for the past 12 years, to engage in good faith negotiations toward a comprehensive nuclear test ban treaty stands in stark violation of one of the most fundamental provisions of the 1968 Non-Proliferation Treaty (NPT), universally regarded as the most important bulwark against the spread of nuclear weaponry. By overlooking this critical provision, and by clinging to an outmoded Cold War mentality regarding nuclear testing policy, the United States jeopardizes much of its recent disarmament gains and stands on the precipice of plunging the world into yet another period of uncertainty, danger and arms racing, at a time when a much more favorable outcome is suddenly well within reach.

This article traces the evolution and current status of the United States nuclear testing policy and critiques the contemporary posture as short-sighted and self-defeating. It begins by recounting the history of the NPT and the affiliated international agreements restricting nuclear testing. It then addresses the 1995 Extension Conference, where the NPT parties will determine the treaty's fate, at the same time shaping the future battles in the struggle to preclude further dissemination of weapons of mass destruction. Finally, the article attempts to place this controversy into a larger context, arguing that it is in the interest of the United States to adhere faithfully to rules of international law and to comply fully with even the ambiguous terms of treaties. Only in this way can the United States pursue its true long-run security interests and help usher in an effective "new world order" based upon respect for international law and common security.

The NPT and Nuclear Testing

Efforts to constrain nuclear weapons testing have long been coupled with efforts to retard the spread of nuclear weaponry, and the two campaigns have played mutually-reinforcing roles. By making nuclear explosions more difficult to conduct, test ban agreements inhibit the progressive qualitative improvements that have fueled the arms race, de-legitimate nuclear weapons as a token of international competition, and ease the regional tensions that could erupt into war.

The first effective test ban accord was the multilateral Limited Test Ban Treaty (LTBT) of 1963, which has now attracted well over 100 parties including the United States, Russia, India, Iraq, Israel, and other countries of proliferation concern. The LTBT prohibited explosions in the atmosphere, in outer space and under water — environments for which the existing national technical means of verification were deemed effective — but it permitted weapons testing and development using explosions in underground tunnels and caverns. The next incremental checks were provided by the 1974 Threshold Test Ban Treaty (TTBT) and its companion 1976 Peaceful Nuclear Explosions Treaty (PNET). These bilateral agreements between the United States and the Soviet Union confined the size of underground nuclear explosions to no more than 150 kilotons yield — roughly ten times the power of the Hiroshima bomb. Within the framework of this series of treaties, the United States has conducted at least 936 nuclear explosions since 1945, the Soviet Union 715, France 192, Britain 44, China 36, and India 1.

Ultimately, the underlying disarmament objective has been a Comprehensive Test Ban Treaty (CTBT) which would permanently outlaw all nuclear explosions in any environment throughout the planet. The Limited Test Ban Treaty notes that the parties are “seeking to achieve” a Comprehensive Test Ban Treaty, and the Threshold Test Ban Treaty requires that “the Parties shall continue their negotiations” toward that end. President Eisenhower declared that the failure to conclude a CTBT was the biggest disappointment of his presidency, and his successors from Kennedy through Carter reaffirmed a comprehensive test ban as a prominent American goal.

The Reagan and Bush administrations, however, marched in other directions. Believing that a test ban would preclude his program of nuclear weapons buildups, President Reagan terminated the CTBT negotiations that had progressed substantially toward a treaty under President Carter. He declared that while CTBT might linger as a “long term objective” of the United States, it was not something to be pursued in the foreseeable future, and its negotiation would depend upon the satisfaction of a fistful of implausible conditions including enhanced verification capabilities, deep reductions in strategic and conventional forces, and the like. The Director of the Arms Control and Disarmament Agency dismissively explained in 1987 that the United States would contemplate a CTBT only “way, way, way down the road ... when there’s peace on earth and good will towards men.”¹

Meanwhile, the Soviet Union and Russia, under the leadership of Mikhail Gorbachev and Boris Yeltsin, undertook a series of unilateral testing moratoria, suspending all their nuclear explosions and calling for American reciprocity and the prompt reinstitution of negotiations for a permanent, verifiable treaty. At the same time, under pressure from military hard-liners, Yeltsin has also been making preparations to resume Russia’s testing, if the United States program proceeds unabated.

1. ACDA Director Kenneth Adelman, quoted in R. Jeffrey Smith, “Negotiators Face Hurdles on Range of Arms Issues,” *Washington Post*, 20 September 1987, A20.

President Bush steadfastly declined to enter into any such negotiations, despite the achievement of breathtaking reductions in the superpowers' strategic arsenals, the virtual halt to all existing American programs for development of new atomic arms, and budgetary pressures that had, as a practical matter, already cut in half the size of the annual testing program. In July 1992, the United States announced new unilateral limitations upon testing (restricting the numbers and purposes of the explosions) but still refused Congressional and other pressures to impose a moratorium on tests or to enter into international negotiations for a CTBT.

The Reagan-Bush Executive Branch hostility toward CTBT was nothing if not creative. The American government, over the past 12 years, issued a stream of phony justifications for the continued testing, ranging from verification concerns to doubts about the continuing reliability of the weapon stockpile to the alleged need to sustain the viability of the weapons laboratories. As each element of this "moving target" of rationalizations was debunked by independent experts, the Administration fell back to other rationales, ultimately resting with the view that as long as nuclear weapons were an important element in providing deterrence, the United States would have to rely upon continued explosive testing. Both Presidents Reagan and Bush promised that in the interim, further incremental steps toward testing constraints would be undertaken, and that negotiations with the Soviet Union or Russia would be initiated sooner rather than later. All of these assurances proved false, however, as the United States government continuously resisted any efforts, undertaken in a variety of multilateral and bilateral forums, to re-institute serious talks.

Most recently, the United States Congress has intervened, dramatically altering the political and legal environment. In legislation approved during the waning moments of the 1992 legislative session, the lawmakers imposed an immediate nine-month moratorium on all American nuclear testing, restricted the future program to no more than five detonations per year for the next three years, and mandated another moratorium of indefinite duration to begin in 1996. Additionally, the measure requires that the President submit a report outlining a schedule for resuming CTBT negotiations with Russia and a plan for achieving a multilateral test ban accord by 1996.

The Clinton administration is currently in the process of responding to this legislative mandate and determining whether and how to resume formal test ban negotiations. During the 1992 election campaign, candidate Bill Clinton forcefully re-asserted his party's traditional policies in strong support of a CTBT, and other countries are now waiting to see what new test ban initiatives the United States will sponsor in 1993.

The Reagan-Bush unwillingness to proceed with further testing limitations is not merely some historical quirk or a minor anomaly in the otherwise dazzling record of achievement in arms control. For over a generation, CTBT has been seen by most of the rest of the world as the single most important device in the arms controller's repertoire and the salient litmus test of superpower sincerity about terminating the nuclear arms race. The failure to conclude a CTBT, and the dogged unwillingness even to talk about one, has cast the United States into

diplomatic isolation and now threatens to unravel the global non-proliferation campaign.

The NPT, it should be recalled, is a remarkably asymmetric instrument. Under it, the non-nuclear weapons states (NNWS) pledge (a) not to receive, manufacture or otherwise acquire nuclear explosive devices, either directly or indirectly; and (b) to accept international safeguards under the auspices of the International Atomic Energy Agency (IAEA) permitting on-site inspection and other intrusions to verify compliance with those underlying obligations. For their part, the nuclear-weapons states (NWS) agree (a) not to assist or encourage any NNWS in acquiring nuclear weapons; (b) to share the benefits of peaceful application of nuclear power for civilian purposes; and (c) to curb the nuclear arms race at an early date.

Both sides in the bargaining have therefore surrendered a critical aspect of sovereignty. The "have not" states eschew a weapons capability that their neighbors with nuclear weapons have apparently found useful, even essential, to their own security. The countries which already possessed such weapons are required to sponsor a technology transfer, sacrificing what could otherwise become a significant commercial advantage in the international marketplace. Both sides have agreed to perpetuate a nuclear oligopoly in favor of the handful of economically and militarily sophisticated states who happened to be the first to invent nuclear weaponry.

Pursuant to this tradeoff, the NPT has become the most successful arms control accord in history, attracting over 150 parties (including the recent adherence of some states that have long been considered "problem countries" for the non-proliferation regime, such as China and South Africa), and it has spawned a series of safeguards accords and regional nuclear-weapons-free-zone agreements which have contributed to global safety. Today, when dangers are rising of the indiscriminant spread of nuclear, chemical, biological, or other high-technology weapons, and the ballistic missiles that could deliver them, the international legal constraints are of increasing importance.

These global realities also explain why attention is increasingly focussed on Article VI of the NPT, which provides:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.²

Although the paragraph is hardly a paragon of drafting elegance or clarity, it is widely considered to be central to the "basic bargain" of the NPT: the NNWS agreed to forswear the option to pursue a nuclear weapons capability, and the NWS agreed to constrain their own nuclear arms race. A treaty that attempted

2. As quoted in *Arms Control and Disarmament Agreements: Texts and Histories of the Negotiations*, (Washington D.C.: U.S. Arms Control and Disarmament Agency, 1990): 100.

to control only one half of the overall problem — concentrating solely on arresting “horizontal proliferation”³ while not adequately fighting “vertical proliferation”⁴ too would be politically intolerable and legally incomplete.

Moreover, among all the possible “effective measures” that Article VI contemplates, a Comprehensive Test Ban Treaty has unique appeal. Many delegations in the 1968 negotiations highlighted a test ban as the single most important arms control strategy needed to balance the disarmament commitment made by NNWS. Such an agreement was repeatedly identified as an urgently needed priority to ameliorate what would otherwise continue to be a “discriminatory” treaty that served the superpowers’ interests better than everyone else’s. Of all the devices available to promote the objectives enshrined in Article VI, a test ban was the leading element on the delegates’ minds and the salient desideratum of the negotiating body. During the key stages of the negotiations of the Non-Proliferation Treaty, the diplomatic representatives from West Germany, Sweden, Canada, Japan and other pivotal countries were unambiguous in asserting that a Comprehensive Test Ban Treaty was the crucial “effective measure” that Article VI would mandate.

It is true that the United States (with the collaboration of the Soviet Union) resisted proposals to incorporate into Article VI any explicit reference to a CTBT or any other specific potential “effective measures” of arms control. The treaty thus does not spell out any agreed agenda or requisite timetable for presenting the international community with the diplomatic products that could achieve the specified objectives. The United States was concerned that the verification apparatus for completing a CTBT might once again prove elusive, with the Soviets dodging, as they had in 1963, the elaboration of an effective system of on-site inspection and remote monitoring. The superpowers also jointly wanted to ensure that they maintained flexibility in the international disarmament agenda — they resisted ceding control to others, or irrevocably committing themselves by treaty to a particular sequence of disarmament accords.

However, behind the non-committal language of Article VI lay a clear consensus on the importance of the Comprehensive Test Ban Treaty. American officials including President Lyndon Johnson, Secretary of State Dean Rusk, and Ambassador Arthur Goldberg reaffirmed the U.S. dedication to a prompt cessation of testing. They acknowledged the primacy of a test ban within the world of disarmament activities, and took the lead in placing it at the top of the diplomatic agenda.

A Comprehensive Test Ban Treaty is the only arms control measure that is specifically called for in the preamble of the Non-Proliferation Treaty. During the 1968 negotiations, numerous other negotiating countries identified CTBT as the crucial component in fulfilling Article VI and several delegations have asserted that a test ban should be the very next item which ought to be

3. Horizontal proliferation is the term generally used to describe the spread of nuclear weapons to additional countries.

4. Vertical proliferation refers to the intensification and elaboration of the nuclear arsenals of countries which already possess nuclear weapons.

considered by the disarmament community. When the NNWS agreed to delete an overt CTBT reference from Article VI, they did so with the conviction that it implicitly remained there — a test ban agreement was an essential ingredient in the cessation of the nuclear arms race, and it was a vital precondition for the pursuit of nuclear disarmament.

Under international law, ambiguities in a treaty are to be construed through reference to a hierarchy of sources of interpretation, including context, other associated contemporaneous instruments, and the subsequent practice of the parties. In this instance, all the signs point in the same direction: in 1968 and consistently thereafter the parties to the NPT understood that “effective measures” of nuclear arms control would embrace a variety of accords including quantitative limitations, a non-use pledge, and a “cut-off” of the production of fissile materials. Foremost among those elements, however, and logically the first item to be pursued, was a Comprehensive Test Ban. The United States, the Soviet Union, and most of the other participants in the multilateral negotiations were quite clear about their commitment to a test ban and their recognition of its central place in the fabric of disarmament. Many national representatives affirmed that the world could not anticipate a reliable end to the nuclear arms race without first concluding the CTBT. Once the testing prohibition was in place, other measures of nuclear and general disarmament were expected to follow logically in sequence.

Article VI levies its obligation upon “each of the parties to the treaty” but the context makes clear that the nuclear weapons states, and particularly the superpowers, are logically the prime movers in developing a suitable text. The NPT could not plausibly mandate the particular terms of a CTBT, nor could it spell out the particular pattern of compromise and creativity that would be necessary to craft a mutually-acceptable document. Instead, it merely mandates the parties “to pursue negotiations in good faith.”

The term “good faith” is one of those excruciatingly ambiguous terms in the lawyers’ lexicon, and it has defied all efforts to import a reliable, concrete meaning. However, an ambiguous term is not necessarily the same as a void one, and there is substantial authority for putting some teeth into this provision. For example, cases litigated before the International Court of Justice in other contexts have construed the phrase “good faith,” taken it seriously as an operative obligation, and decreed that the term requires the parties “to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a [unilateral position].... They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”⁵

Furthermore, the body of domestic United States labor law, quite a different source of jurisprudence, provides similar, analogous standards. Under the

5. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and the Netherlands), *International Court of Justice Reports* 1969, 47.

National Labor Relations Act, management and unions are obligated to bargain collectively "in good faith" about a range of employment issues. The courts have undertaken a close scrutiny of the parties' behavior, statements, and negotiating positions to determine whether each side exhibits a "sincere desire to reach an agreement." In a strategy similar to that of the NPT, the statute does not mandate that either party make concessions or accept compromises — hard, positional bargaining is perfectly within bounds — but "surface negotiation," cynically going through the motions of bargaining with no real interest in reaching a tolerable *modus vivendi*, is illegal.

In the case of the nexus between the Non-Proliferation Treaty and a Comprehensive Test Ban Treaty, as in these diverse legal precedents, the term "good faith" is elusive, and where any form of negotiation is ongoing, it is difficult to establish the absence of the requisite sincerity. International disarmament negotiations are ordinarily undertaken beneath a cloak of secrecy, and the classification of the ongoing record makes it impossible to establish which party is bargaining in good faith, and which one is "really" blocking consensus. But determining the opaque "state of mind" of the participants has been largely irrelevant for the past twelve years in the CTBT context, when no negotiations at all have occurred. The United States has refused numerous attempts to proceed with CTBT talks; the Executive Branch has overtly stated that it would not seek under present or foreseeable circumstances to conclude a treaty. More blatant disregard of "good faith" is hard to imagine.

Today, the NPT is recognized as even more important than it was in 1968. It provides a fundamental international lever for access to the otherwise-secret nuclear operations inside countries such as Iraq, Libya, and North Korea. It secures a basis for inquiry and objection to provocative nuclear collaboration with "threshold" countries such as Brazil or India, even when they remain outside the treaty itself. It reliably guarantees that technologically sophisticated countries such as Germany and Japan are confined solely to peaceful nuclear activities. The NPT is the centerpiece of the entire global non-proliferation regime, and the specter of losing or weakening it is daunting.

A Comprehensive Test Ban Treaty has also garnered extraordinary international support. The United Nations General Assembly has passed more resolutions on CTBT than on any other subject. In recent years, the average vote on a resolution endorsing a prompt test ban has included 120 countries in support; typically only the United States and the United Kingdom have voted against it. The Conference on Disarmament (CD), widely recognized as the leading multilateral disarmament negotiating body, has likewise endeavored to facilitate the elaboration of a treaty. Once again, however, it is the United States which has stymied the efforts, confining the CD's participation to a low-level experts' working group or other informal deliberations lacking international stature. The United States has consistently fought, in a variety of contexts, to make a CTBT harder to achieve and to make Article VI of the NPT less relevant and successful.

NPT Review Conferences

An important, novel feature of the NPT was the establishment of a review conference, to be convened every five years, providing the parties the occasion to assess "the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized." Four such review conferences have been assembled to date. Each has been a boisterous, unruly affair, marked by tense confrontation as well as by limited constructive consensus. At each conference, the connection between CTBT and the NPT has been highlighted as the principal controversy dividing the assembly.

At the first quinquennial meeting, in 1975, the NNWS dismissed the Threshold Test Ban Treaty as a woefully inadequate substitute for a comprehensive test ban and demanded that a CTBT be developed. In 1980 — the one occasion when trilateral CTBT negotiations were actually underway — the non-nuclear weapon states were so agitated over the slow pace of the deliberations that no consensus could be achieved over any type of a meaningful concluding statement or document, and the conference broke up in disarray. By 1985, the battle lines had been starkly drawn, and only a bizarre compromise produced a final statement in which the vast majority of participants decried the failure to produce a CTBT, and called for the resumption of negotiations as a matter of the highest priority. In the succeeding paragraph of the report, the United States and the United Kingdom, the only two dissenters, asserted that while CTBT remained a suitable long-term goal, it was not something to be pursued under current circumstances, and that precedence should be given to further reductions in strategic arms. Most recently, the 1990 Review Conference re-played the discord of 1980, and the conflict over pursuit of a CTBT again wrecked the conference. A proposed final resolution, embodying useful contributions on improved IAEA safeguards and security assurances, was 95 per cent drafted, but when the United States resisted incorporating strong language on a test ban, the entire document was lost.

In reviewing the tone of past review conference declarations, it is striking that the non-nuclear weapon states were not simply arguing that a CTBT would be an important and valuable contribution to global security, nor were they simply urging its prompt negotiation. Rather, they asserted in addition that the NWS *already owed* the world a CTBT, that it was a past-due commitment undertaken in 1963 and 1968, and that satisfaction of that previous obligation should not be further delayed.

All of this might be little more than an academic debate or another tempest in the multilateral disarmament teapot except for Article X section 2 of the Non-Proliferation Treaty. This provision of the treaty stipulates that twenty-five years after the treaty enters into force, a conference of all parties shall be convened to decide, by simple majority vote, "whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods." Article X was inserted into the treaty as a concession to the non-nuclear weapon states in order to ensure a realistic occasion for "second thoughts" about

the treaty, and to provide a reliable opportunity for meaningful reappraisal of whether the treaty, including the asymmetric disarmament obligations, remained in the parties' interests. As the treaty entered into force in 1970, 1995 will mark its twenty-fifth year, and preparations for the upcoming Extension Conference are already getting underway.

The language of Article X section 2 is ambiguous, and an unprecedented diplomatic and legal debate has already emerged regarding the extension possibilities. What will happen if the parties are unable, as they were in 1990 and 1990, to reach a consensus about the NPT? Will the treaty expire, be extended for an indefinite term, or be allowed to limp along somehow until the parties are able to deal with their differences on CTBT and other issues in a more productive, consensual fashion?

Of course, there are numerous other problems for the Extension Conference to deal with, and some of them may again prove problematic for the parties. For example, does the Iraqi case prove that greater IAEA inspection provisions are necessary to ensure against diversion of nuclear materials from peaceful to military applications? Have the technologically advanced countries welshed on their commitment to share the benefits of nuclear power, by instituting excessively restrictive national and international controls on the access to nuclear materials and technology?

The make-or-break issue for the NPT, however, is likely to continue to be the test ban. One negotiator for a nuclear weapon state long ago concluded that the NPT was one of the "greatest con games of all times" because the non nuclear weapon states gave up so much and received so little of concrete value in return.⁶ Many NNWS have come to see the treaty in a similarly harsh light — they continue to criticize it as a discriminatory and one-sided attempt to preserve superpower nuclear hegemony. Some states (India, Pakistan, Israel, Cuba) have remained outside the NPT, and others have periodically issued veiled threats to defect from it. Additionally, many NNWS parties are unwilling to support vital proposals to enhance the defective safeguards regime, until the NWS half of the treaty is confirmed, too. The United States' unwillingness to entertain serious negotiations on the subject of a test ban accord now stands as the most serious threat to the continued integrity and enhancement of the non-proliferation regime.

Recently, there has been some "revisionist" assessment of the prospects for the 1995 conference. Some experts have opined that the latest breakthroughs on other arms control matters, including the deep cuts agreed to in the Strategic Arms Reduction Talks, the Conventional Forces Europe (CFE) Treaty restructuring armaments in Europe, and the new Chemical Weapons Convention have amply satisfied Article VI. They argue that numerous effective measures are already in place, and suggest that if a CTBT is still outstanding, it has lost much of its imperative. Moreover, the political dynamics of the extension conference may be altered by other important exogenous events. Mexico, for example, has

6. As quoted in William Epstein, *The Last Chance: Nuclear Proliferation and Arms Control* (1976): 118.

long been a leader in promoting a CTBT, but as the conclusion and implementation of the North American Free Trade Agreement (NAFTA) reach a delicate stage, perhaps some trade-offs will occur, through which Mexico will recede a bit on the disarmament advocacy in return for more favorable consideration on the trade front.

There is also the bare possibility that further incremental test ban limitations could be derived, advancing the LTBT-TTBT-PNET sequence one more notch, yet again stopping short of a comprehensive prohibition. At the 1990 Review Conference, the United States struggled to preserve the notion that Article VI might be satisfied, and the 1995 confrontation deferred, through some sort of additional interim agreement (perhaps reducing the maximum size of permitted nuclear explosions from 150 to 10 or 25 kilotons yield, or confining each party to an annual quota of perhaps three tests). The NNWS, however, showed little interest in any further compromise, and the patience of the U.S. Congress has worn thin, too. It is therefore doubtful that ploys of this sort — unless tied to a fixed timetable for transition into a real CTBT — would be widely acceptable.

In addition, a new wrinkle in the controversy has unfolded: independent of the Review Conference and Extension Conference proceedings, some NPT parties might allege in international litigation that the United States' unwillingness to participate in good faith negotiations on the subject of a test ban treaty has been a violation of the negotiating obligations of Article VI of the treaty. That is, by failing to comply with the mandate for test ban talks, the United States has for the past twelve years been committing a "material breach" of an essential provision of the accord, perhaps actionable within the jurisdiction of the International Court of Justice.

Under international law, an innocent party aggrieved by another state's unwarranted material violation of a treaty has recourse to several specific remedies. Foremost among them is the right, after a series of procedural steps involving mandatory settlement efforts, to "suspend the operation of the treaty in whole or in part or to terminate it." A feisty NNWS could perhaps, therefore, declare a moratorium on reporting nuclear data to the IAEA; it could disrupt or halt mandatory inspections of its safeguarded civilian nuclear power facilities; in an extreme case, it could assert that it would initiate a new program seeking to receive, manufacture, or otherwise acquire nuclear weapons, gutting the Non-Proliferation Treaty and challenging the entire non-proliferation regime.

Short of that calamity, it seems apparent that efforts to strengthen or enhance the existing provisions of the NPT are doomed as long as the cloud of Article VI hangs overhead. That is, the NWS (and several key NNWS) have repeatedly attempted to derive improvements in the safeguards regime, hoping to import additional verification methodologies that might have proven useful in deterring or detecting cheating such as Iraq's. Conceptual work on bolstered inspection rights, earlier notifications, and other procedures is quite advanced. During the 1990 Review Conference, for example, the parties were able to draft by consensus a package of quite useful and creative mechanisms. But that accord dissolved when the antagonism over CTBT re-emerged, and nothing has been

effectuated. Indeed, there is little prospect that the NNWS could be persuaded to "give" more on verification rights, until the NWS more fully honor their part of the basic treaty bargain.

In spite of this background, we should all hope that some sort of arrangement can be negotiated in order to sustain and enhance the NPT. The treaty is of paramount importance and its value as an impediment to proliferation will only rise in the increasingly complex multipolar environment ahead. Yet we cannot be sanguine that the political battles of the 1970s and 1980s have suddenly disappeared. Interest in a CTBT on the part of the non-nuclear weapons states has not much abated, and they continue to consider a test ban to be a vitally important piece of "old business" that the United States has blocked for too long. In 1991, NNWS advocates succeeded in convening an "Amendment Conference" of parties to the Limited Test Ban Treaty, to consider altering that document, by turning it into a CTBT. Under the prevailing rules of the LTBT, the United States retained a veto right over any such modification, so that conference, too, ended in tumult and disarray with the United States in virtual isolation. It represents another assertion of ongoing interest and intense diplomatic activity in pursuit of a halt to nuclear testing and it may provide an ominous foreshadowing of the 1995 NPT conference, where the rules of procedure may reverse the burdens of diplomatic initiative.

The Political and Legal Context

The United States has three primary interests to pursue in this context. First, a prompt CTBT would enhance American national security. It would freeze weapons development in its current stage, where the United States possesses a significant qualitative advantage. It would lock in intrusive verification rights at a most propitious moment, guarding against future retrograde developments in Russia or elsewhere. It would pinch off any efforts to pursue a novel series of "third generation" nuclear weapons, which could lead to a new round of nuclear armaments of all sorts. It would save money. It would end the painful diplomatic isolation of the United States in various disarmament fora. It would materially aid our non-proliferation objectives.

Second, the United States has a major stake in the preservation of the Non-Proliferation Treaty. The Third World is now the most likely flashpoint for military confrontations; it is where local hostilities are most likely to erupt and where American friends, allies and interests are most prone to be drawn into conflict. What is now required is greater attention to the diverse, novel, and chaotic threats emerging from unfamiliar regions of the world. The Non-Proliferation Treaty has for twenty years been the key instrument in circumscribing these hazards, and it can continue to play a vital role in preserving stability.

Third, the United States has an accelerating interest in the preservation of international law and the honoring of treaty commitments. More than any other country, we depend upon international agreements to sustain our far-flung business, communications, security, and other interests. We are the foremost

maker of treaties and the chief beneficiary of a system in which countries take their international obligations seriously.

The model of a powerful rogue country, successfully exploiting ambiguities and loopholes in a solemn international agreement, and blithely thumbing its nose at the international community is hardly the precedent we should want to set. Even if the United States could, in some sense, "get away with it," our illustration of lawless behavior, and our continuing disrespect for the letter and spirit of a treaty are hardly responsible or intelligent actions. If we want other countries to abide by international law; if we seek to move the world in the direction of diplomacy and jurisprudence, rather than continued reliance upon brute force; and if we hope others will take seriously our rhetoric about a "new world order," built upon increased respect for the international rule of law, then we have to start modeling that type of behavior ourselves.

Conclusion

The comparison between the United States government policy on nuclear testing and nonproliferation in 1993 and the New York Giants baseball team in the 1908 pennant race is even more compelling than indicated in the opening paragraphs of this article. When "Bonehead" Merkle failed to touch second base, he was not guilty of some bush-league oversight or obvious gamesmanship error — he was simply following the contemporary major league custom. Although the official rules of baseball, then as well as now, required the baserunner to advance safely all the way to second base in that situation, the actual practice of umpires and teams was to not enforce that provision rigidly, if at all.

Only three weeks before that eventful game, in fact, the Chicago Cubs and the Pittsburgh Pirates (who were also in the thick of the pennant drive that year) had played another close, tense game, ending, incredibly, in precisely the same play: the Pirates had runners on first and third, with two out in the bottom of the last inning of a tied game. Honus Wagner then propelled one of his 3,430 career hits into center field, and the runner from third strolled home with the tie-breaking score. However, the runner from first, a utility player named Warren Gill, never made it as far as second base before reversing course and trotting back into the dugout. The Cubs outfielder retrieved the ball, rifled it to Johnny Evers on second base, and argued for a force out. The umpire, Hank O'Day (who, by a remarkable coincidence, would also be the umpire at the Polo Grounds for the September 23 Merkle play) refused to call the out.

O'Day argued that in that situation, a hit to the outfield was considered "automatic," and the runners need not advance. The Cubs protested vainly that the rulebook specified otherwise, but the actual practice of the day favored lazy enforcement, and the umpire's casual assessment stood. O'Day, however, must have repeatedly turned the play over in his mind thereafter, and the next time the situation arose, he — and the alert Evers — were ready with a more rigid interpretation.

The Giants manager, the redoubtable John J. McGraw, resolutely defended

the young Merkle after the 1908 season, characterizing him as one of the smartest, keenest players in the game, far from earning his "Bonehead" sobriquet. Merkle was, in the end, an unfortunate victim of circumstance—the rules of the game had suddenly been changed, without his knowledge. His lapse was entirely appropriate, under the "old" mode of operation, and he was ignominiously caught in baseball lore when he failed to recognize and react to the new style of more punctilious play.

In nuclear non-proliferation, a similar transformation has occurred. The official rule mandating good faith negotiation of a Comprehensive Test Ban Treaty has been on the books since 1968-70, but the other parties to the Non-Proliferation Treaty have (reluctantly) let it slide for two decades. Now, however, the written rule may be enforced with newfound vigor, and the 1995 Extension Conference will demand greater adherence to the objective of a permanent cessation to nuclear testing.

The United States, however, has continued its anachronistic approach, still proceeding under an old, less-demanding understanding of Article VI that is now obsolete. Just at the time when the United States is claiming victory in our long-standing Cold War struggle for national security, we may yet snap back into defeat and frustration through failure to recognize the new realities of the international arena. Maintenance of the global non-proliferation regime, as well as pursuit of other United States international security objectives, will now be best served by prompt negotiation and conclusion of a CTBT. Only a bonehead would overlook this play.

